No. 18174

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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APPELLANT EXECUTOR'S OPENING BRIEF

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No. 18174

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SECURITY FIRST NATIONAL BANK, as executor of the Will of Ben H. Sheldon, deceased, ROBERT HOHLY and MAE SHELDON,
Appellants,

vs.

EVA S. LUTZ, as Administratrix of the Estate of Walter A. Lutz, deceased,
Appellee.

EVA S. LUTZ, as Administratrix of the Estate of Walter A. Lutz,
Appellant,

vs.

SECURITY FIRST NATIONAL BANK, as executor of the Will of Ben H. Sheldon, deceased, ROBERT HOHLY and MAE SHELDON,
Appellees.

APPELLANT EXECUTOR'S OPENING BRIEF.

Statement Showing Jurisdiction and Summarizing Prior Proceedings.

This is the second appeal in an action tried to the court without a jury in which jurisdiction is founded upon diversity of citizenship and an amount in controversy exceeding the sum of $10,000.00, exclusive of interest and costs. 28 U. S. C. §1332. Plaintiff is a citizen of the State of Washington[1] [R.* 154-155] and

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[1]Plaintiff Walter A. Lutz (herein called "Lutz") has died and his wife, Eva S. ("Sunny") Lutz, substituted as the duly appointed, qualified and acting administratrix of his estate.

*"R." and "R. Supp." are used herein to designate, respectively, the printed Transcript of Record and printed Supplemental Transcript of Record comprising the record in the first appeal (No. 16905 on the records of this court). "Clk. Tr." and "R. Tr." are used herein to designate, respectively, the Clerk's Trans-

defendants are, for diversity purposes, citizens of the State of California.[2]

On the first appeal, this court reversed the judgment of the district court rendered against all five defendants in the sum of $31,566.25, set aside the $15,000.00 exemplary damages assessed against Hohly and the $15,000.00 "compensatory damages" assessed against Mae Sheldon, set aside the judgments against the other two defendants directing entry of judgment in their favor[3] and remanded the cause for "further proceedings in conformity with this [court's] opinion." [Clk. Tr. 580.] *Security First National Bank of Los Angeles v. Walter A. Lutz,* 297 F. 2d 159, 166 (9th Cir. 1961).

That reversal was predicated in part upon the district court's error of law in depriving Sheldon of credit for moneys owing him at the time of the incorporation of the business venture, a partnership in which Lutz was a limited partner. The indebtedness then owing Sheldon was for cash advances made by him to the partnership

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cript of Record and the Reporter's Transcript of Proceedings after remand. The numbers following such designations indicate pages in those records and, except where otherwise noted, reference to "R. Tr." is to the Reporter's Transcript of Proceedings had on March 19, 1962.

[2]Security First National Bank (herein called the "Bank") is a national banking association organized under the laws of the United States and having its principal place of business in the State of California. The Bank is sued in its representative capacity as executor of the Will of Ben H. Sheldon, deceased (herein called "Sheldon"). The two other defendants, Mae Sheldon and Robert Hohly, are sued in their proprietary capacities.

[3]These two defendants, Flamingo Trailer Manufacturing Corporation (the corporate entity that received the partnership assets as of February 1, 1955) and James G. Thompson (who purchased all the corporate shares and debentures after Sheldon's death) recovered judgment in their favor after remand pursuant to the instructions given by this court to the district court. [Clk. Tr. 582-583.]

and for services he rendered as its chief executive officer from the effective date of its formation, July 1, 1954, until its incorporation on February 1, 1955. The admitted facts established the net amount of Sheldon's additional cash contributions during this period, designated as loans on the cash receipts ledger of the partnership, to be $57,200.00. [R. 158-159.] The uncontroverted evidence showed that Sheldon was paid no compensation at all for his services prior to February 1, 1955. [R. 1110.]

Sheldon unilaterally settled the obligations owing him by taking 80% of the corporate stock and debentures whereas he had (together with Mae Sheldon) but a 60% interest in the partnership. The Bank conceded that Sheldon was not entitled to settle the obligations owing him in this manner. The Bank contended in the district court and on the first appeal that Sheldon was, nevertheless, entitled to a credit for the partnership indebtedness owing him. In that contention this court found merit. *Security First National Bank of Los Angeles v. Walter A. Lutz, supra,* 297 F. 2d at 162.

The district court had denied any credit to Sheldon for his cash advances made after July 1, 1954 because it concluded that the $57,200.00 was paid by Sheldon in fulfillment of obligations arising out of a promise he made to plaintiff in May, 1954, almost five months prior to the execution on October 18 of the integrated partnership agreement. [R. 218-219; 222-223.] The district court had further denied any compensation to Sheldon for his personal services because it concluded that under the terms of the partnership agreement the general partners were not entitled to compensation for their services absent the subsequent agreement of a

majority in interest of the limited partners. [R. 220-221.]

This court, in reversing the judgment of the district court on the first appeal, necessarily found, first, that the integrated partnership agreement made October 18, 1954 could not be altered or amended by promises or misrepresentations purportedly made some five months prior to its execution and, second, that Sheldon was entitled to *reasonable* compensation for the services he rendered, despite the fact the evidence showed there was no *agreed* amount of compensation.

After remand a hearing was had on February 19, 1962. At that time the "further proceedings" were limited by the court, with the consent of all counsel, to the taking of additional evidence on the issue of the reasonable value of Sheldon's services. [R. Tr. for February 19, 1962; 56-57.] Such evidence was adduced at a hearing had on March 19, 1962. It consisted in part of the testimony of two independent experts, both called on behalf of defendants. The first, James L. Harner,[4] testified that for the period from July 1, 1954 to January 31, 1955, the reasonable value of the services rendered by Sheldon to the partnership was $22,000.00, and for the period from February 1, 1955 until his death on March 3, 1956, $71,000.00. [R. Tr. 73, 74.] The second expert, Page E. Golsan,[5]

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[4]Mr. Harner is the sole consultant in industrial relations specializing in the field of executive compensation on the Western Region staff of the management services department of Arthur Young & Co., a national accounting firm. [R. Tr. 65-67.]

[5]Mr. Golsan is a consulting management engineer with twenty six years' experience with Ford, Bacon & Davis, a national management engineering firm, the last ten of which were as its senior partner in charge of its Pacific Coast business. [R. Tr. 79-82.]

testified that in his view the reasonable value of those services for the periods in question was $20,000.00 and $77,000.00, respectively. [R. Tr. 84, 88.]

The district court thereafter reaffirmed its original findings of fact,[6] made supplemental findings of fact hopelessly at variance with the evidence and with the opinion of this court and reinstated the same judgment against the Bank as executor, increasing the amount of the judgment against each of the other two defendants.

Timely notices of appeal were filed by all three defendants from the final judgment of the district court and their respective appeals duly perfected. Jurisdiction of this court is founded on 28 U. S. C. §1291.

Summary Statement of the Case.[7]

In early 1954, Sheldon, a retired contractor 65 years old, became interested, first, as landlord to, and then as an investor in and officer of a going trailer manufacturing business. [R. 155; R. Tr. 15-16, 20-22.] In May, 1954, having bid for and been awarded a government contract to manufacture 169 house trailers, Sheldon invited others, including Lutz and a lawyer

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[6]The obduracy of the district court in resurrecting the identical judgment reversed by this court and in reaffirming the findings reviewed by this court and found wanting is best exemplified by the district court's reaffirmation of Finding of Fact 39(9), *viz.*, that James G. Thompson was *not* a bona fide purchaser of the stock and debentures purchased by him from the Bank as executor—a finding utterly inconsistent with the decision of this court on the first appeal and its direction to the district court to render a judgment in favor of James G. Thompson and utterly inconsistent with the judgment rendered after remand by the district court pursuant to that instruction.

[7]A lengthy statement of the case, fully documented by reference to the printed record on appeal, appears at pages 5-31 of the Bank's Opening Brief in the first appeal.

named Eisenhower, to participate as investors in the venture. [R. 156, 863-64, 1052.] On May 24, Lutz responded to Sheldon's invitation and agreed to purchase three points in the venture for $18,000.00 [R. 944.] On May 28, Eisenhower, who had lent Sheldon some assistance with the federal agency responsible for awarding the government contract, agreed to purchase a 5% interest for $10,000.00 [R. 865-66; R. Supp. 10-11.] The same day Sheldon wrote Lutz that Eisenhower was "taking five points" in the venture. [R. 945-46.]

On June 2, Eisenhower made his cash investment of $10,000.00 and on June 22, Lutz paid the $18,000.00 for the three point interest in the venture for which he had bargained. [R. 865; R. 156.]

In early July, 1954, Eisenhower and Sheldon met in Los Angeles to work out a partnership agreement that would be effective retroactively as of July 1. [R. 867-71; R. Supp. 14-19.] One of the topics discussed was the capital contributions and percentage participations of each of the investors. Sheldon had allocated a 3% interest to Lutz for his $18,000.00 cash investment [R. Supp. 20, 72], a 5% interest to Eisenhower purchased for $10,000.00 cash and "contributions through services and loans" [R. 865-66, 924], and 60% to himself to cover his total investment. [R. Supp. 17-18.]

Sheldon's cost investment as of July 1, 1954 was $81,655.97.[8] The limited partners had contributed cash in

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[8]As of July 1, 1954, Sheldon had contributed to the partnership land, a factory building, cash and all the assets subject to liabilities of the going business. [R. 1106, 716-717.] Sheldon had paid a

the aggregate amount of $56,020.00 [R. 58-59.] Thus, Sheldon's cost investment constituted 59.3% of the total cash investment for which he was to receive a 60% interest. Eisenhower, on the other hand, had contributed 7.3% and Lutz 13.2% of the total cash investment for which they were to receive but 5% and 3%, respectively, of the partnership shares.

Both Sheldon and Eisenhower thought the proposed percentage allocations unfair. They tried several other divisions of the forty points allocated to the limited partners [R. Supp. 20-21], finally increasing Lutz' interest from 3% to 8% and Eisenhower's from 5% to 13% (split 10% to himself and 3% to his wife Lucille). [R. 1115; R. Supp. 72-3, 81.]

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total of $10,300.00 to acquire control of the going business in April. [R. 155. The printed record at page 1106 reflects two payments, one of $6,000.00 and one of $4,000.00 by Sheldon to purchase the controlling stock interest in the going business. The $6,000.00 figure is correct but the $4,000.00 figure should be $4,300.00 as shown by the admitted facts in the amended pre-trial conference order as reproduced at page 155 of the printed record.] His total net cash contribution aggregated $22,000.00 after allocation of $6,000.00 to the capital accounts of one of his children and a child of Mae Sheldon by a former marriage. [R. 1106, 716-717.] Of the $22,000.00 net cash contribution, $8,000.00 had its source in a personal loan to Sheldon from one L. B. McKinney. [This amount is not reflected in the summary prepared by plaintiff's expert accountant, Mr. Villee, and reproduced at R. 1106. Mr. Villee, however, conceded that the $8,000.00 amount designated on the cash receipts ledger of the business as "Loan, McKinney-Sheldon" was posted to notes payable in favor of Sheldon and that the posting to the credit of Sheldon appeared regular on its face. He further conceded that he would require additional evidence before concluding that the posting to the credit of Sheldon was not correct and that he found no such additional evidence. See R. 535-538.] The cost of the land and of the factory building contributed by Sheldon was, respectively, $14,250.00 and $35,-105.97. [R. 1106.] Thus, the aggregate cost investment by Sheldon as of July 1, 1954 was $49,355.97 for land and factory building, $10,300.00 to acquire control of the going business contributed to the partnership and $22,000.00 cash, for an aggregate of $81,655.97.

In mid-August, Sheldon, on his own initiative, asked Eisenhower if he and Lucille would decrease their total percentage interest so that Lutz' interest could be correspondingly increased. [R. Supp. 48-49, 81-82.] Eisenhower agreed to a 1% decrease in the interest allocated to Lucille and Lutz' interest was again increased, this time from 8% to 9%. As so modified, the partnership agreement, finally reduced to writing, was executed by all the partners on about October 18, 1954. [R. 156.]

During the period from and after the effective date of formation of the partnership and prior to its incorporation, Sheldon advanced cash to the partnership in the net sum of $57,200.00 as follows: $5,200.00 in July, $10,000.00 in October, $16,000.00 in December and $26,000.00 in January, 1955.[9] [R. 158-59, 1106.]

During the period from March, 1954 until his death in 1956, Sheldon was "in charge of business operations" [R. Tr. 9-10], was chief executive officer of the trailer enterprise [R. Tr. 22, 24] to whom the production manager, McKinney, reported [R. Tr. 24], was alone engaged in the sales work which thrust the business into prominence within a year [R. Tr. 22], participated in design of the trailers being manufactured [R. Tr. 24], was chief financial officer for the company [R. Tr. 25] and was, as the district judge himself succinctly noted, "the chief executive officer of everything. . . ." [R. Tr. 24.]

In compensation for his labors which in June, 1954, consumed six 12-hour days a week in the business [R.

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[9]An additional $10,000.00 advanced by Sheldon in July was repaid to him without interest in August, 1954. [R. 1106.]

946-47] and from August, 1955 until his death not less than five full days a week [R. 765], Sheldon received not a penny prior to incorporation on February 1, 1955. [R. 1110; R. Tr. 26-27; R. Tr. 52-53.] Thereafter he received $4,776.07 as salary for the month of February, 1955 [R. 1110; R. Tr. 39-40] and $72,076.35 for the twelve-month period ending February 29, 1956, or an aggregate of $76,852.42 for the thirteen months following incorporation and until his death on March 3, 1956. [R. 1110.]

By the manner in which the February 1, 1955 incorporation of the business was accomplished, the Sheldon interest was increased from 60% to 80% while that of Lutz was decreased from 9% to 4.29%. [R. 158.]

Following Sheldon's death on March 3, 1956, the Bank was appointed and qualified as executor of Sheldon's will. [R. 160.] In April, 1956, the Bank as executor and Mae Sheldon entered into an agreement with James G. Thompson for sale of the Sheldon securities in the trailer corporation, comprising both shares and debentures. With approval of the probate court, the agreement was consummated on May 8, 1956 for a total purchase price of $425,000.00, allocated $44.04 per share and face value (without accrued interest) for the debentures. [R. 160; R. 1138-1145.]

In October, 1956, Lutz filed a creditor's claim against Sheldon's estate by which he claimed 390.98 shares and $6,341.45 face value debentures of the trailer corporation. [R. 67-70.] The claim was rejected by the Bank as executor and this action thereafter commenced by Lutz—predicated upon the rejected claim—within the time prescribed by law.

On June 14, 1957, Lutz sold his shares and debentures in the trailer corporation for the sum of $23,083.35, allocated $44.04 per share and face value together with accrued interest, for the debentures. [R. 161.] This price plaintiff considered fair. [R. 454.]

Specification of Errors.

1. The district court erred in refusing to follow the plain mandate of this court in Cause No. 16905 by resurrecting, on evidence more favorable to the Bank, the identical judgment against it as was heretofore reversed.

2. The district court erred in imposing upon Sheldon a capital contribution obligation different from that defined by the written partnership agreement.

3. The district court erred in construing the compensation provisions of the written partnership agreement to require subsequent accord among a majority in interest of the limited partners as to amount of compensation as a condition precedent to any obligation owing Sheldon for salary.

4. The district court erred in receiving and relying upon evidence of antecedent negotiations and promises to vary or contradict the plain terms of the written partnership agreement.

5. Findings of fact 37, 38, 39 and supplemental findings of fact 1 to 16, both inclusive, are clearly erroneous in that they are unsupported by the evidence and are in derogation of the law of the case.

6. The district court erred in arbitrarily rejecting the uncontradicted and entirely probable opinion testimony of the independent and unimpeached experts who valued the services rendered by Sheldon.

7. The district court erred in disallowing Sheldon credit for his $57,200.00 advances and the reasonable value of the services he rendered to the trailer venture.

8. The district court erred in awarding as conversion damages any sum in excess of $18,094.40.

Summary of Argument.

I.

The district court erred in reasserting the correctness of its original judgment by reinstating it in derogation of the law of the case as embodied in the decision of this court.

II.

The district court erred in imposing a capital contribution obligation upon Sheldon different from that defined by the partnership agreement.

III.

The district court erred in disallowing Sheldon a credit for the $57,200.00 advanced by him to the trailer business after the formation of the partnership and prior to its incorporation.

IV.

The district court erred in disallowing Sheldon a credit in payment for personal services of the reasonable value of $20,000.00 rendered by Sheldon to the trailer business after the formation of the partnership and prior to its incorporation.

V.

The district court erred in awarding the sum of $31,566.25 or any sum at all in excess of $18,094.40 as conversion damages.

ARGUMENT.

I.

The District Court Erred in Reasserting the Correctness of Its Original Judgment by Reinstating It in Derogation of the Law of the Case as Embodied in the Decision of This Court.

On the first appeal, this court decided that Sheldon and the persons claiming through him were, in the computation of conversion damages, entitled to consideration for the $57,200.00 cash advanced to and the reasonable value of Sheldon's services rendered on behalf of the trailer partnership. This court concluded that if Lutz, "upon equitable principles, is to be permitted to avoid the consequences of his consent to incorporation, equitable consideration must be given to the rights of Sheldon, restored to him in the eyes of equity by that very avoidance." The findings and judgment revealing that no such consideration was given, the cause was remanded for "due consideration to the balancing of equities." *Security First National Bank of Los Angeles v. Lutz, supra,* 297 F. 2d at 163.

Ignoring the plain mandate of this court, the district court determined on remand that "Sheldon has no equities to which he, or anyone claiming through him, is justly entitled under recognized equitable principles." [Clk. Tr. 601, lines 26-28.] It thereupon reinstated its original judgment as against the Bank, assessing larger amounts of damages against the other defendants.

Thus, this case stands now in precisely the same posture as it did on the first appeal but for the evidence adduced at the further proceedings following remand and but for the supplemental findings of the district

court which are, as hereinbelow particularized, clearly erroneous.

The evidence adduced at the further proceedings following remand comprises the testimony of six witnesses, three called by plaintiff and three by defendants [R. Tr. 3], and two exhibits, one detailing the total charges made by plaintiff's expert accountant [R. Tr. 33-35; Ex. 222] and the other a report of the inheritance tax appraiser of the State of California valuing the life estate bequeathed Mae Sheldon under the terms of Sheldon's will. [R. Tr. 100-103; Mae Sheldon's "E".] The witness' testimony was primarily directed to the question of the degree of responsibility, authority and devotion of Sheldon to the management of the trailer business, with a valuation by two defense experts of the services rendered by Sheldon. All the witnesses with personal knowledge of Sheldon's activities (two of whom were called by plaintiff), reinforced the defense contentions of his worth to the business enterprise and his responsibility for its success. [R. Tr. 9-10, 21-25.] That new testimony was merely cumulative to testimony adduced at the first trial.

Accordingly, the district court was bound by the law of the case to afford Sheldon, and those claiming through him, consideration for his advances and for the reasonable value of his services. *Criscuolo v. United States,* 250 F. 2d 388 (7th Cir. 1957); *Kaku Nagano v. Brownell,* 212 F. 2d 262, 263 (7th Cir. 1954); *State of Kansas v. Occidental Life Ins. Co.,* 95

F. 2d 935, 936 (10th Cir. 1938); *General Motors Accept. Corp. v. Mid-West Chevrolet Corp.,* 74 F. 2d 386, 388 (10th Cir. 1934).[10] This the district court did not do.

Instead, it reaffirmed its original findings of fact 1 through 40 and 42 [Clk. Tr. 3, lines 29-30] supplementing those findings by further findings merely iterating its originally adopted positions, first, that the $57,200.00 advances were capital contributions in fulfillment of a promise made by Sheldon almost five months prior to the reduction to writing and the execution of the partnership agreement and, second, that Sheldon was not entitled under the agreement to any compensation at all, its plain terms to the contrary notwithstanding. In so doing, the district court acted in disregard of the evidence before it and in derogation of its duty under the mandate of this court.

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[10]"It is well settled that all matters decided on appeal become the law of the case to be followed in all subsequent proceedings in both the trial and appellate court. [Cites omitted.] That doctrine applies where the evidence is substantially the same on both trials. It does not have application if the evidence on the subsequent trial presents a materially different situation. [Cites omitted.] And the introduction of new testimony at the subsequent trial which is merely cumulative does not take a case without the rule. *Zurich General Accident & Liability Ins. Co. v. O'Keefe* (C.C.A.) 64 F. (2d) 768. Of course, the doctrine is not an iron rule which denies a court the power to correct a manifest error or mistake of a serious nature in a former decision. It is one of sound policy. *Litigation would be unduly prolonged if every dissatisfied suitor were permitted to obstinately renew on successive appeals questions previously considered and decided."* (Emphasis added; 74 F. 2d 386, 388.)

II.

The District Court Erred in Imposing a Capital Contribution Obligation Upon Sheldon Different From That Defined by the Partnership Agreement.

The district court deprived Sheldon of any credit for the $57,200.00 net cash he advanced to the partnership after the effective date of its formation, $42,000.00 of which was contributed between December 26, 1954 and January 26, 1955. [R. 1106.] It did so because it found those cash payments, admittedly designated as loans on the cash receipts ledger of the partnership [R. 158-159], to be contributions to the partnership capital. That result obtains, says the district court, because the payments "were in partial satisfaction of the Sheldons' capital contribution obligation. . . ." [Clk. Tr. 8, lines 12-13.] This capital contribution obligation, according to the district court's theory, has its genesis in a representation made by Sheldon to Lutz about May 20, 1954 that Sheldon was going to invest $150,000.00 in the business.[11] [R. 401-402; see also R. Tr. for February 19, 1962, 26-29.]

Paragraph 6 of the integrated partnership agreement, as finally executed on October 18, obligated the Shel-

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[11]Alternatively, the District Court suggests in its supplemental finding [Clk. Tr. 8, lines 21-23] that Mae Sheldon's representation of June 22, 1954 that "we have over $100,000.00 in . . ." the business [R. 947] has some bearing on Sheldon's capital contribution obligation. That, of course, is a logical impossibility since Lutz had already agreed by his May 24, 1954 letter to purchase three points in the business for $18,000.00 [R. 945]. Barring the question of his peculiar powers of extrasensory perception as to which the record is silent, Lutz could neither have anticipated nor relied upon Mae Sheldon's June 22 representation in agreeing the preceding May to take a three per cent interest in the trailer business.

dons to contribute as their share of the partnership capital, not $150,000.00 as the district court has determined, but rather a going trailer manufacturing business together with the land and factory buildings then being used in the conduct of that business. [R. 58-59.] This contribution the general partners admittedly made. [R. 156-157.] Concededly, the cost of that contribution to the general partners was not $150,000.00. Presumably for that reason, the district court deemed the $57,-200.00 cash payments made by Sheldon to the partnership after the effective date of its formation to be additional capital contributions in partial fulfillment of Sheldon's May 20 promise. Were that construction of the written agreement permitted to stand, Sheldon's capital contribution to the partnership at his cost would aggregate $81,655.97 (see note 8, *supra*) plus $57,-200.00, or $138,855.97. Such a construction would devolve upon Sheldon the obligation to pay 71.3% of the total capital contributions for a 60% share of the business. The inherent unfairness of that result aside, the district court's refuge in a May 20 promise to construe the plain language of the October 18 agreement violates the parol evidence rule and ignores the aggrandizement of Lutz' partnership share from the time he first agreed to purchase three points in May until the execution of the October agreement which accorded him a nine per cent interest, all for the same $18,000.00 investment.

The rules of construction require that courts give effect to the mutual intention of the parties as it existed at the time of the execution of their agreement and as that mutual intention is objectively manifested by the language used. *Jones v. Polloch,* 34 Cal. 2d 863, 866, 215 P. 2d 733. The words employed to manifest that

mutual intention are to be interpreted in the sense that they are ordinarily used. Only where upon the face of the agreement itself there is doubt or ambiguity as to the meaning intended should resort be made to extrinsic evidence disclosing the circumstances surrounding the execution of the agreement. *Averitt v. Garrigue,* 77 Cal. App. 2d 170, 172-173, 174 P. 2d 871. Contemporaneous and prior oral negotiations are regarded as merged into the writing and cannot vary or contradict the terms of the written agreement. *Hale v. Bohannon,* 38 Cal. 2d 458, 465, 241 P. 2d 4. This rule is not a rule of evidence but a rule of California substantive law. *Estate of Gaines,* 15 Cal. 2d 255, 264-265, 100 P. 2d 1055.

The capital contribution provisions of the integrated partnership agreement made October 18 are clear and unambiguous. They require no resort to extrinsic evidence to ascertain the intention of the parties. The words used mean precisely what they say, viz., that the "contribution of the general partners to the capital of this partnership shall consist of real property with the buildings situate thereon . . . together with all the machinery, equipment, tools, goods, wares and merchandise, inventory of material, work-in-process, cash and accounts receivable, and all assets . . . now used . . . in the manufacture, sale and distribution of house trailers." [R. 58-59.] No permissible construction of that language would either allow the imposition on Sheldon of an obligation to contribute $150,000.00 as his capital share or tolerate the conversion of his $57,200.00 advances into capital contributions.

> "If this could be done then every written contract of sale, no matter how carefully and specifically

> it described the property to be sold, could be varied by proof that the seller orally agreed to convey additional property not described in the written contract. A written agreement to sell a horse for $100 could be varied by evidence that the seller had also orally agreed to transfer a cow, or [a] contract to purchase 1,000 tons of coal could be varied by showing an oral agreement to deliver a bonus of 100 tons additional for the same consideration." *Dillon v. Sumner,* 153 Cal. App. 2d 639, 643, 315 P. 2d 84.

Thus, the district court erred in varying the plain meaning of the capital contribution provisions by reference to an oral promise made almost five months prior to execution of the integrated written agreement. And even assuming that resort to the circumstances surrounding execution of the integrated agreement were necessary to enable interpretation of its terms, still the district court's refusal to take cognizance of the increase in Lutz' partnership share is unexplained and inexplicable.

In May, 1954, Lutz had bargained for a three point interest in the business. In July, 1954, that interest was increased from three to eight per cent at the initiative of Eisenhower and Sheldon. In August, at Sheldon's sole initiative, Lutz' interest was again increased, this time to nine per cent. If Lutz were seeking to reform the partnership agreement to include a capital contribution on the part of Sheldon of $150,000.00, *as the district court has done,* then Lutz' interest must necessarily be revised to three per cent *in line with his original agreement.* This revision the district court failed to make. And Lutz is understandably reluctant

to urge this reformation since he received 4.29 per cent of the corporate shares and debentures. If, however, Lutz is to be permitted to reap the benefits of the October 18 agreement—the larger share afforded him *at Sheldon's instance*—then he ought to be compelled to abide by its clear and unambiguous terms and not upon a manifestly unreasonable interpretation of the capital contribution obligations affecting only the general partners.

III.

The District Court Erred in Disallowing Sheldon a Credit for the $57,200.00 Advanced by Him to the Trailer Business After the Formation of the Partnership and Prior to Its Incorporation.

Paragraph 23 of the partnership agreement provides in part that if additional funds are needed to carry on the business operations of the partnership, the general partners are authorized to borrow such funds from any financial institution, from any one or more of the limited partners, or from the general partners themselves subject to the understanding that "any such loan made by any of the partners shall be repaid before any distribution of income or capital . . . to any of the partners." [R. 66.]

From the effective date of its formation on July 1, 1954, the partnership did experience need for additional funds in the operation of its business. That need was satisfied by bank loans [R. 1159] and by advances made to the partnership by Sheldon himself. [R. 158-59.]

In July Sheldon advanced the sum of $15,200.00 to the partnership, of which $10,000.00 was repaid him in August. [R. 1106.] From October 13, 1954 to

January 26, 1955, Sheldon made five separate additional cash advances to the partnership in the aggregate sum of $52,000.00. [R. 1106.] Each of those advances was designated on the cash receipts ledger of the partnership to be a loan. [R. 158-59.] The partnership thereby received the benefit of the use of Sheldon's money for which, under the terms of the district court judgment, Sheldon and those claiming through him received not a penny's credit.

Pursuant to the terms of the consent to incorporation signed by Lutz on January 31, Sheldon was entitled to take additional corporate securities to be issued by the receiving corporation in repayment of all or part of the partnership obligations owing him. This he did. That action was, however, deemed improper by the district court and by this court. Lutz was thereby permitted to avoid the consequences of his consent to incorporation. As of February 1, 1955, Sheldon was nevertheless entitled to repayment of the advances made. Disallowance by the district court of any credit for those advances constituted judicial error.

IV.

The District Court Erred in Disallowing Sheldon a Credit in Payment for Personal Services of the Reasonable Value of $20,000.00 Rendered by Sheldon to the Trailer Business After the Formation of the Partnership and Prior to Its Incorporation.

The district court, to justify its refusal to grant a credit or offset to Sheldon and those claiming through him for the personal services Sheldon rendered and for which he was not paid, determined, first, that "Sheldon disclaimed and waived any right to salary" [Clk. Tr.

602, lines 4-5], second, that Sheldon's services were of *de minimis* value to the business [Clk. Tr. 602, lines 16-32 and 603, lines 1-5], third, that Sheldon actually paid himself $4,776.07 for the period from March 18, 1954 to February 18, 1955 [Clk. Tr. 602, lines 6-15] and fourth, that his reasonable worth was $600.00 monthly [Clk. Tr. 603, lines 6-10 and 604, line 1] which was considerably less than he actually received. Any relationship between those supplemental findings of the district court and the evidence before it borders upon coincidence.

First, there is no evidence that Sheldon disclaimed or waived any right to salary. To the contrary, that Sheldon took salary during the period following the February 1, 1955 incorporation and that he took additional corporate shares and debentures in repayment of the partnership salary obligation owing him manifested an intention on his part to be compensated for those services. That Sheldon indicated in the spring of 1954 that he had no interest in salary compensation cannot reasonably be construed to be a waiver of his right to salary where, under the terms of the October 18 partnership agreement, he was expressly afforded that right. So to construe Sheldon's antecedent comments is to read the compensation provisions of the integrated agreement entirely as surplusage—a result at war with recognized rules of construction. It is the office of the court, in the construction of an agreement, to explain and not to omit what has been inserted. *Katz v. Haskell,* 196 Cal. App. 2d 144, 157, 16 Cal. Rptr. 453.

Second, that Sheldon was primarily responsible for the growth of the business into the largest trailer manufacturer on the West Coast at the time of his death

[R. 822-823] is plainly evident from the record, the district court's supplemental finding that those services were "insubstantial" to the contrary notwithstanding. [Clk. Tr. 603, line 5.] The "experienced trailer executive," J. L. Merrifield, at whose door the district court laid some of the responsibility for the venture's success, was able prior to Sheldon's association with the business to sell a total of some fifteen trailers during the months of April, May, June and July of 1953. [R. 1045.] As of March 18, 1954, when Sheldon first assumed command, the book value of the venture's tangible assets over liabilities (exclusive of good will) was $3,441.81. [R. 1047.] On February 29, 1956, less than two years later, the business had annual sales of over $6,200,000.00 and a net worth of approximately $324,000.00 of which almost $292,000.00 was earned surplus. [R. 1134-35.] While it is true as the district court found that Eisenhower was instrumental in securing the May 19, 1954 government contract, there is no evidence that he "participated in production and sales policy decision." [Clk. Tr. 602, lines 24-7.] In so far as Eisenhower's procuring "vital raw materials" is concerned [Clk. Tr. 602, line 25], plaintiff's own witness, Merrifield, testified that Eisenhower's role in this regard was to inform "Mr. Sheldon where plywood could be bought from some mills that he had some interest in," that is, "he informed Mr. Sheldon where these mills were and put him in line where he could buy material there." [R. Tr. 18, lines 11-12 and 16-18.] The factory superintendent, L. B. McKinney, who was in charge of production, was hired by Sheldon and reported to Sheldon. [R. Tr. 24.] Sheldon alone was responsible for the sales effort upon which the business

success was based. [R. Tr. 22.] He was the chief executive officer [R. Tr. 22, 24] and the chief financial officer [R. Tr. 25] and even participated in the design of the trailers being manufactured. [R. Tr. 25.] As the district judge himself observed:

> ". . . that man Sheldon was the dynamo of the enterprise. I don't think there is any question about that. He ran every aspect of it, as I see it. He not only ran it, he was the dictator of it in every respect." [R. Tr. 105, lines 1-4.]

Third, the uncontroverted evidence discloses that Sheldon received not a single penny for the services he rendered prior to February 1, 1955. [R. 1110.] That the district court could find to the contrary [see Clk. Tr. 602, *supra*] is incredible in that the subject was explicitly covered in the further proceedings following remand and it was the plaintiff's own expert, Mr. Villee, who testified unequivocally that the salary payment of $4,776.07 debited on the books of the receiving corporation as of February 28, 1955 and found by the district court to cover the period from March 18, 1954 to February 18, 1955 was for officer salaries *for the single month of February, 1955!* [R. Tr. 39-41.]

Fourth, the $600.00 determination of the district court as the reasonable monthly value of the services that Sheldon rendered is without *any* evidentiary support. The record reflects three valuations only, one by the defendant Hohly and two by independent experts called on behalf of the defendants. Their opinions are as follows:

Carroll Robert Hohly (defendant)

July 1, 1954-Jan. 31, 1955	$30,000-$35,000
Feb. 1, 1955-Mar. 3, 1956	70,000- 90,000

James L. Harner (independent expert — Arthur Young & Company)

July 1, 1954-Jan. 31, 1955	$22,000
Feb. 1, 1955-Mar. 3, 1956	71,000

Page Golsan (independent expert—retired partner of Ford, Bacon & Davis)

July 1, 1954-Jan. 31, 1955	$20,000
Feb. 1, 1955-Mar. 3, 1956	77,000

The district court was of course at liberty to reject the opinion of defendant Hohly because of his interest in the outcome of the action. *Tidlund v. Seven Up Bottling Co.,* 154 Cal. App. 2d 663, 666-67, 316 P. 2d 656. And plaintiff was at liberty to adduce other satisfactory evidence rebutting the opinion testimony of the independent and unimpeached experts offered on the part of the defendants. *Estate of McCollum,* 59 Cal. App. 2d 744, 750, 144 P. 2d 176. Such rebutting evidence was not, however, forthcoming. Under the circumstances, the district court was not entitled to reject arbitrarily or upon mere caprice the uncontradicted and entirely probable testimony of the unimpeached experts. *Wirz v. Wirz,* 96 Cal. App. 2d 171, 176, 214 P. 2d 839. Yet that is precisely what the court did, without justification or the semblance of an explanation. Further, the court made its supplemental finding of fact that the reasonable value of Sheldon's services was $600.00 monthly, a finding not only without evidentiary support but one inherently improbable in the light of common experience. As the district judge had earlier opined:

> "Well, of course, *a thousand dollars a month* wouldn't be any great pay for someone to run that business. I don't imagine there'd be people com-

petent to run it standing in line to make application for employment *at that rate.*" [Emphasis added; R. Tr. for February 19, 1962, 55, lines 19-23.]

The denial of credit for services rendered on the first appeal was founded upon the fact that the general partners and a majority in interest of the limited partners had never reached agreement upon the *amount* of compensation to which Sheldon was entitled [R. 220-221] and upon judicial interpretation of the compensation provisions of the partnership agreement that, absent such subsequent agreement as to amount, no compensation at all was payable to Sheldon. The finding, buttressed by a supplemental finding to the same effect [Clk. Tr. 601, lines 15-21], is correct; the interpretation, however, is against the law.

The partnership agreement includes a provision for compensation of the limited partners employed in the business "at such compensation as shall be determined by the General Partners . . ." [R. 65, par. 22] and a provision for the compensation of the general partners at "such reasonable compensation for services in operating the business of the partnership as shall be agreed upon between said General Partners, and a majority in interest of the Limited Partners . . ." [R. 65, par. 23.] The district court was quick to realize that construing the compensation provisions relative to the general partners as requiring the subsequent agreement of a majority in interest of the limited partners rendered those provisions nugatory. In this regard the district judge said:

"And what is all that? That is an agreement to make an agreement *which is worth nothing,* isn't it? [Emphasis added; R. Tr. for February 19, 1962, 31, lines 7-9.]

Nevertheless, the court adopted that construction which rendered the words used meaningless. As we said on the first appeal, that result is patently absurd. Sheldon could not unilaterally deprive Merrifield, one of the limited partners employed in the business, of any and all compensation by refusing to agree upon the amount of his salary compensation. Neither can a majority in interest of the limited partners deprive Sheldon of salary compensation by arbitrarily withholding their consent.

Manifestly, where a provision for the benefit of a particular person is included as an inducement to his execution of the contract, there must be some method by which that person can enforce the contract provision though the agreement of the other signatories is required by its terms and is withheld. That method is determination by the court. *United States v. Swift & Co.,* 270 U. S. 124, 140; *Young v. Nelson,* 121 Wash. 285, 209 Pac. 515; *Wilson v. Wilson,* 96 Cal. App. 2d 589, 216 P. 2d 104.

Manifestly, where a partnership agreement contemplates compensation by its express terms, that compensation should not be denied simply because the subsequent agreement as to amount either was withheld or was not solicited. Concededly, Sheldon had no right to fix his compensation arbitrarily. Had he appropriated $50,000 as compensation for services the reasonable value of which was but $20,000, he would be answerable to the partnership for the unjustified portion of the salary taken. The only proper measure of the salary compensation owing, absent a subsequent agreement as to its amount, *is the reasonable value of the services rendered.*

Of the obligations owing Sheldon at the time of the incorporation of the business there was $20,000.00 in salary (taking the lower of the two expert valuations) in addition to the $57,200.00 advances he had made. For this, Sheldon was entitled to credit. The district court's disallowance of that credit constituted judicial error.

V.

The District Court Erred in Awarding the Sum of $31,566.25 or Any Sum at All in Excess of $18,094.40 as Conversion Damages.

The Bank, acting in its representative capacity, sold to James G. Thompson on May 8, 1956, all of the trailer venture securities standing in Sheldon's name. It thereby realized $44.04 per share of stock and face value, without any accrued interest, for the debentures. The aggregate amount realized by the Bank for the securities Lutz claims the Bank converted is, therefore:

391.04 shares @ 44.04	$17,221.40
$7,821 debentures at face	7,821.00
Total	$25,042.40

As of the date of incorporation of the trailer business the aggregate amount of the partnership obligations owing Sheldon were $77,200.00, of which $57,200.00 constituted advances and $20,000.00 (based on the lower of the two independent expert valuations) executive compensation. The consent to incorporation having been set aside by Lutz, his share of the partnership indebtedness owing Sheldon as of February 1, 1955 was 9% of $77,200.00 or $6,948.00. Debiting the amount of the conversion damages in that sum, the result obtained is

$18,094.40. This amount together with interest from May 8, 1956, is the maximum award realizable by plaintiff under the evidence and the law. The district court awarded plaintiff the sum of $31,566.25 as conversion damages, together with interest from December 10, 1959. [Clk. Tr. 609, lines 12-17.] In so doing, it committed judicial error.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed and the case remanded with instructions to the court to enter a judgment in favor of plaintiff in a sum not to exceed $18,094.40.

Respectfully submitted,

LAWLER, FELIX & HALL,
ROBERT HENIGSON,
Attorneys for Appellant Security First National Bank, as Executor of the Will of Ben H. Sheldon, Deceased.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT HENIGSON.

APPENDIX 1.

Exhibits

(Rule 18(2)(f) of the Rules of the United States Court of Appeals for the Ninth Circuit.)

[Note: The exhibits marked by an asterisk (*) were stricken from the record as against the Bank as executor only by order of the District Court [R. 179].]

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
1	R. Supp. 6	R. 663	R. 665
2	"	"	"
3	"	"	"
4	"	"	"
5	"	"	"
6	"	"	"
7	"	"	"
8	"	"	"
9	"	"	"
10	"	"	"
11	"	"	"
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18	"	"	"
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20	"	"	"
21	"	"	"
22	"	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
23	"	"	"
24	"	"	"
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28	"	"	"
29	"	"	"
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31	"	"	"
32	"	"	"
33	"	"	"
34	"	"	"
35	"	"	"
36	"	"	"
37	"	"	"
38	"	"	"
39	"	"	"
40	"	"	"
41	"	"	"
42	"	"	"
43	"	"	"
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45	"	"	"
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49	"	"	"
50	"	"	"
51	"	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
52	"	"	"
53	"	"	"
54	"	"	"
55	"	----------	----------
56	"	----------	----------
57	"	R. 663	R. 665
58	"	"	"
59	"	"	"
60	"	"	"
61	"	"	"
62	"	"	"
63	"	"	"
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75	"	"	"
76	"	"	"
77	"	"	"
78	"	"	"
79	"	----------	----------
80	"	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
81	"	"	"
82	"	"	"
83	"	"	"
84	"	"	"
85	"	"	"
86	"	"	"
87	"	"	"
88	"	"	"
89	"	"	"
90	"	"	"
91	"	"	"
92	.....	R. 665	R. 667
93	R. 338	"	"
94	R. 345	"	"
95	R. 344	"	"
96	.....	"	"
97	R. 352	"	"
97A	R. 473	"	"
98	.....	"	"
99	.....	"	"
99A	R. 471	"	"
100	.....	"	"
101	.....	"	"
102	R. 360	"	"
103	.....	"	"
104	.....	"	"
105	.....	"	"
106	.....	"	"
107	R. 361	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
108	R. 362	"	"
109	R. 364	"	"
110	.....	"	"
111	R. 367	"	"
112	.....	"	"
113	R. 368	"	"
114	.....	"	"
115	.....	"	"
116	.....	"	"
117	.....	"	"
118*	.....	"	"
119*	.....	"	"
120*	.....	"	"
121*	.....	"	"
122*	R. 376	"	"
123*	R. 378	"	"
124	.....	"	"
125*	.....	"	"
126*	.....	"	"
127*	.....	"	"
128*	R. 380	"	"
129*	.....	"	"
130*	R. 383	"	"
131	.....	"	"
132	.....	"	"
133	.....	"	"
134	.....	"	"
135*	.....	"	"
136*	.....	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
137	.....	"	"
138	.....	"	"
139	R. 407	R. 432	R. 433
140	R. 408	"	"
141	R. 412	"	"
142	R. 412	"	"
143	R. 417	"	"
144	R. 418	"	"
145	R. 418	"	"
146	.....	"	"
147	R. 419	"	"
148	R. 419	"	"
149	R. 420	"	"
150	R. 420	"	"
151	R. 421	"	"
152	R. 421	"	"
153	R. 421	"	"
153A	.....	R. 700	R. 700
154	R. 422	R. 432	R. 433
155	R. 423	"	"
156	R. 423	"	"
157	R. 423	R. 432	R. 433
158	424	"	"
159	424	"	"
160	425	"	"
161	425	"	"
162	426	"	"
162A	426	"	"
163	428	"	"
164	"	"	"
165	"	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
166	"	"	"
167	"	"	"
168	"	"	"
168A	R. 432	.....	.....
169	R. 429	R. 432	R. 433
170	"	"	"
171	"	"	"
172	"	"	"
173	R. 430	"	"
174	"	"	"
175	"	"	"
176	"	"	"
177	"	"	"
178	"	"	"
179	.....	R. 667	R. 668
180	.....	R. 667	R. 668
181	.....	"	"
182	.....	"	"
183	.....	"	"
184	.....	"	"
185	.....	"	"
186	.....	"	"
187	.....	"	"
188	.....	"	"
189	.....	"	"
190	.....	"	"
191	.....	"	"
192	.....	"	"
193	.....	"	"

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
194	.....	"	"
195	R. Supp. 22	R. 668	R. 668
196	R. Supp. 23	R. 668	R. 668
197	R. Supp. 39	R. 668	R. 669
198	R. Supp. 41	R. 670	R. 670
199	R. Supp. 67	.....	.....
200	R. 355	R. 670	R. 670
201	R. 385	R. 386	R. 386
202	R. 385	R. 386	R. 386
203	R. 385	R. 386	R. 386
204	R. 519	R. 671	R. 676
205	R. 519	R. 671	R. 676
205A	R. 520	"	"
205B	R. 520	"	"
206	R. 520	"	"
207	R. 520	"	"
208	R. 521	"	"
209	R. 521	"	"
210	R. 531	"	"
211	R. 531	"	"
212	R. 603	R. 676	R. 676
213	R. 607	R. 676	R. 678
214	R. 639	R. 678	R. 678
215	.....	.....	.....
216	.....	.....	.....
217	R. 659	R. 679	R. 680
218	.....	R. 680	Withdrawn
219	R. 689	.....	.....
220	R. 698	R. 699	R. 699
222	R. Tr. 35	R. Tr. 35	R. Tr. 35

Exhibit Number	Received for Identification	Offered into Evidence	Received into Evidence
		Bank as Executor	
AA	R. 795	R. 796	R. 796
A	R. 543	.....	.....
B	R. 556	.....	.....
C	R. 559	.....	.....
D-K	.....	.....	.....
L	.....	R. 703	R. 703
M-1	R. 703	R. 704	R. 704
N-1	.....	R. 705	R. 705
N-2	.....	R. 705	R. 705
Q-1-7	.....	.....	.....
R-1	R. 538	.....	.....
S-1	R. 502	.....	.....
S-2	R. 502	.....	.....
T	.....	R. 713	R. 713
U	.....	R. 713	R. 714
V	.....	.....	.....
X	.....	R. 711	R. 711
Y	.....	R. 711	R. 711
Z	R. 752	R. 753	R. 753
		Mae Sheldon	
A	.....	R. 786	R. 787—Rejected
B	.....	R. 786	R. 787—Rejected
C	.....	R. 786	R. 787—Rejected
D	.....	R. 787	R. 787
E	R. Tr. 103	R. Tr. 103	R. Tr. 103
		James Thompson	
G	R. 403	.....	.....
H	R. 452	R. 455	R. 455

All of the exhibits above listed as to which there is no record designation, with the sole exception of Thompson's G, were offered and received in evidence (unless otherwise specifically noted). Agreeably with Rule 17(6) of the Rules of this Court, only those portions of the record material to the consideration of the points raised on appeal were designated to be included in the printed transcript. As a result, the printed transcript of record does not include all the references necessary to complete the table. *E.g.,* defendant Bank's S-1 and S-2 were offered and received in evidence on June 5, 1959, as reported in Volume 3 of the reporter's transcript at page 332 thereof, but that page, having no particular significance to the issues raised on this appeal, was not included in the printed record.